19-3204-cv

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DONALD J. TRUMP,

Plaintiff-Appellant,

v.

CYRUS R. VANCE, JR., in his official capacity as District Attorney of the County of New York; MAZARS USA, LLP,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York, No. 19-cv-8694 (Marrero, J.)

PRESIDENT TRUMP'S OPENING BRIEF

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JURISDICTION

The district court had jurisdiction because the President alleges violations of federal law, 28 U.S.C. §1331, and sues to vindicate "any right, privilege or immunity secured by the Constitution," §1343; 42 U.S.C. §1983. This Court has jurisdiction because the President appealed from a final judgment that dismissed the entire case. 28 U.S.C. §1291. The district court entered that judgment on October 7, 2019, and the President filed an emergency notice of appeal the same day. JA195.

STATEMENT OF THE ISSUES

I. The President of the United States is suing a state official for violations of the federal Constitution, invoking the President's absolute immunity from state judicial process. Does the doctrine of *Younger* abstention require the President to litigate this claim in state court?

II. The Constitution prohibits States from subjecting the President of the United States to criminal process while he is in office. Does a county prosecutor violate that immunity when he issues a grand-jury subpoena, backed by the threat of contempt, for the President's records, for the purpose of investigating and potentially indicting the President for state crimes?

III. This Court entered an administrative stay that will expire on October 23, after which the President's accountant, Mazars USA, LLP, will disclose his records to the prosecution. Should this Court extend the stay so that the President's documents are not disclosed before his case is decided by this Court and, if necessary, the Supreme Court?

STATEMENT OF THE CASE

For the first time in our nation's history, a county prosecutor has subjected the President of the United States to criminal process. The New York County District Attorney has issued a grand-jury subpoena for reams of President Trump's private financial records, for the express purpose of deciding whether to indict him for state crimes.

The District Attorney appears to be investigating whether the President's businesses accurately recorded two payments made in 2016 and, if not, who is responsible. JA48. Although the payments have been public knowledge since at least January 2018, the District Attorney waited until August 2019 to subpoena The Trump Organization. JA48. That subpoena requested "documents and communications" concerning the payments for "the period of June 1, 2015, through September 20, 2018." JA39.

The President's attorneys opened a dialogue with the District Attorney and voluntarily produced over 3,000 documents responsive to the subpoena. JA48. But the District Attorney later revealed that he read the subpoena to cover The Trump Organization's *tax returns*. JA21 ¶45. When the President's attorneys resisted that implausible interpretation, the District Attorney decided to circumvent the President by issuing a new subpoena to Mazars, the President's longtime accountant. The Mazars subpoena was issued on August 29, with an initial return date of September 19. JA32.

Unlike the subpoena to The Trump Organization, the subpoena to Mazars is not tailored (in duration or scope) to the 2016 payments or business records about those payments. It seeks reams of confidential financial information, reaches back to 2011, names the President personally, and asks for his personal records (including his tax returns). JA34. Remarkably, the subpoena to Mazars is identical to a subpoena that the U.S. House Oversight Committee issued to Mazars. JA22-23; *see* Doc. 11-2, at 3, *Trump v. Comm. on Oversight & Reform*, No. 19-cv-1136 (D.D.C.). The only exception is that the House Oversight Committee did not ask Mazars for the President's tax returns, but the District Attorney did. The tax-returns request mirrors a subpoena that the House Ways and Means Committee sent to the Treasury Department. JA22; *see* Doc. 1-14, *Comm. on Ways & Means v. U.S. Dept. of Treasury*, No. 1:19-cv-1974 (D.D.C.). Essentially, then, the District Attorney cut-and-pasted two congressional subpoenas into a document and sent it to Mazars. He later admitted that he copied Congress's subpoenas because he "thought it would be efficient." JA173.

As with The Trump Organization subpoena, the President's attorneys reached out to engage in good-faith negotiations over the Mazars subpoena. JA23. The District Attorney refused to narrow the subpoena, allow more time for negotiations, or (unlike the House Oversight, Financial Services, and Intelligence Committees) stay enforcement of the subpoena while the parties litigate. While the District Attorney offered to give Mazars until September 23 to produce the tax-return portion of the

subpoena, JA59, that brief extension dealt with a mere subset of the requested documents and gave the President no time to litigate.

The President was forced to file this suit on September 19 (the subpoena's due date), along with an emergency motion for a TRO and a preliminary injunction. JA1; Doc. 6 at 3. The President challenged the subpoena under 42 U.S.C. §1983, Article II of the Constitution, and the Supremacy Clause as a violation of a sitting President's immunity from state criminal process. JA10-15. He also asked for a stay pending appeal. Doc. 22 at 8, 25.

After a conference call with a law clerk, the District Attorney agreed to stay enforcement of the Mazars subpoena until September 25 so the parties could (rapidly) brief and argue the President's motion. JA28. The U.S. Justice Department filed a letter supporting the President's request and asking for a chance to be heard. Doc. 31. When the District Attorney refused to offer any additional time, JA192-93, the district court granted an additional 24-hour stay. JA62. The District Attorney then agreed to stay the subpoena until October 7 at 1:00 p.m. JA64.

On October 7 at 8:45 a.m., the district court issued a 75-page opinion, denying the President's requests for interim relief and dismissing his complaint. JA76. The court held that the President's case belongs in state court under the abstention doctrine of *Younger v. Harris*, 401 U.S. 37 (1971). JA61-103. As an "alternative" holding, the district court rejected the President's claim of immunity on "the merits." JA103. "[R]eject[ing]" fifty years' worth of Justice Department memoranda that it admits "have assumed

substantial legal force," the court concluded that a sitting President *can* be indicted while in office. JA114-15. It thought the President's immunity should be assessed on a case-by-case basis—the President might be immune from "lengthy imprisonment" or "a charge of murder," for example, but not necessarily lesser crimes. JA72, 127. Here, the President is not immune because the Mazars subpoena also investigates *others* for criminal wrongdoing, not just the President. JA103-04, 73, 94. Lastly, the district court rejected the President's request for interim relief. It found he was not likely to succeed on the merits, would not suffer irreparable harm if Mazars disclosed his information to the grand jury, and would harm the public interest if he interfered with the District Attorney's investigation. JA108-10, 141.[1]

Because Mazars was set to disclose the President's documents hours after the district court's decision, the President filed an emergency notice of appeal and an emergency motion for an administrative stay. JA196. He asked this Court to stay the subpoena, before Mazars irreparably divulged his confidential records, so the Court could consider granting the President a stay pending appeal. *See* CA2 Doc. 8. Within an hour, the Court granted the President's motion—highlighting "the unique issues raised by this appeal." JA197. The Court then established an expedited briefing schedule, instructed the parties to simultaneously brief both "the merits" and the "stay pending

[1] The district court rejected the District Attorney's reliance on the Anti-Injunction Act. *See* JA80-81.

appeal," and scheduled oral argument for October 23. JA198-99. The Court clarified that its administrative stay will "remain[] in effect until argument is completed." JA199.

SUMMARY OF THE ARGUMENT

The district court's decision is the first to relegate a sitting President's federal claim to state court, and the first to hold that a State can criminally prosecute a sitting President. It should be reversed, and the subpoena should be stayed pending appeal and Supreme Court review.

I. There is no basis to abstain under *Younger*. As the Supreme Court has made clear, federal courts have an obligation to exercise their jurisdiction, and can decline to do so only in rare cases. This is not one of those cases; in fact, it is the paradigmatic case where federal courts should *not* abstain. There is no basis for insisting that the President pursue a claim that the federal Constitution immunizes him from state process in *state* court. Forcing him to do so deprives the President of the very immunity he seeks to vindicate and ignores that this dispute is a clash between the federal government and a State—not an ordinary challenge by a private litigant. That the President is represented by private counsel changes nothing. That fact was also true, and irrelevant, in *Clinton v. Jones*. It is equally irrelevant here.

Another reason *Younger* abstention does not apply is because the President is challenging a grand-jury subpoena to a third party. A grand-jury proceeding is not an ongoing criminal proceeding for purposes of *Younger*, as the Third Circuit has persuasively explained. Grand juries do not adjudicate constitutional claims; the

President would need to initiate a *new* state proceeding to do that. *Younger* does not require plaintiffs to take that step, which would amount to an exhaustion-of-state-remedies requirement.

Regardless, the President has *no* avenue for seeking relief in state court because the subpoena was not issued to him. The District Attorney has never explained—despite many chances to do so—how New York courts could hear a third-party challenge to a grand-jury subpoena. The district court's effort to make the argument on the District Attorney's behalf missed the mark. The only case it found involving a criminal subpoena held that the motion to quash was, in fact, not cognizable because the movant lacked standing to challenge the third-party subpoena.

Finally, *Younger* abstention does not apply here because this subpoena was issued in bad faith. That is apparent from the subpoena itself, which is a carbon copy of two congressional subpoenas concerning issues far afield from anything the District Attorney claims to be investigating. The District Attorney defends his abusive subpoena by claiming that copying Congress was efficient. But the law does not give him the right to issue irrelevant and overbroad subpoenas for the sake of convenience. In all events, the President plausibly alleges that the subpoena was issued for reasons that, at best, have a secondary relationship to the grand-jury proceeding. That is sufficient to defeat *Younger*.

II. The President's claim of absolute immunity is meritorious. While the district court focused on various Justice Department opinions, it failed to seriously confront

the settled constitutional principles that underlie those opinions. There has been broad bipartisan agreement, for decades if not centuries, that a sitting President cannot be subjected to criminal process. That consensus follows from the Constitution's text, history, and structure, as well as from precedent. The Framers recognized the need for a strong Chief Executive and created a process for investigating and removing him a manner that would embody the will of the people. A lone county prosecutor cannot circumvent this arrangement. That the Constitution empowers thousands of state and local prosecutors to embroil the President in criminal proceedings is unimaginable. State criminal process interferes with the President's ability to execute his duties under Article II, violates the Supremacy Clause, and contradicts our constitutional design.

The district court's proposal to replace the Constitution's bright line with an eight-part balancing test should be rejected. As the Supreme Court has repeatedly explained, issues of absolute immunity must be resolved on a categorical basis. To be sure, a bright-line rule will hamper some prosecutions and, in rare cases, raise statute-of-limitations problems. But those concerns pale in comparison to the myriad problems that case-by-case balancing would entail. Contra the district court, immunizing a sitting President from criminal process does not place him above the law; it follows our supreme law.

This subpoena subjects the President to criminal process under any reasonable understanding of that concept. It demands the President's records, names him as a target, and was issued as part of a grand-jury proceeding that seeks to determine

whether the President committed a crime. That the grand-jury proceeding might involve other parties, or that the subpoena was issued to a third-party custodian, does not alter the calculus. If it did, a state prosecutor could easily circumvent presidential immunity.

III. This Court should extend the administrative stay to ensure that the status quo is preserved while the President pursues his claim to judgment here and, if necessary, the Supreme Court. This litigation could take several paths. But no matter what, this Court should ensure an orderly process that does not require the President to file more emergency motions (potentially as soon as the afternoon of oral argument on October 23). As in *Nixon* and *Jones*, this serious legal dispute (which involves circuit splits and momentous questions of first impression) should be fully resolved on appeal before the President is forced to submit to coercive process. Equity and respect for the office favor preserving the status quo. This Court should take the necessary steps, including staying the mandate pending the filing of a certiorari petition, to ensure that the President's documents are not disclosed before his claim of immunity is fully aired.

ARGUMENT

The district court dismissed the President's complaint under *Younger* and ruled, in the alternative, that his constitutional claim was unlikely to succeed. This Court reviews both holdings de novo. *See In re Joint E. & S. Dist. Asbestos Litig.*, 78 F.3d 764, 775 (2d Cir. 1996); *In re Nw. Airlines Corp.*, 483 F.3d 160, 165 (2d Cir. 2007). And both holdings are mistaken. Even if the Court agrees with the district court, however, it

should stay the challenged subpoena until its mandate issues in this appeal and the President files a certiorari petition with the Supreme Court.

I. *Younger* abstention is not appropriate here.

There is no dispute that Congress gave the federal courts jurisdiction to hear this case. *See* 28 U.S.C. §§1331, 1343; *cf. Benavidez v. Eu*, 34 F.3d 825, 829 (9th Cir. 1994) ("*Younger* abstention is *not* jurisdictional"). To quote Chief Justice Marshall, federal courts "have 'no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.'" *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013) (quoting *Cohens v. Virginia*, 19 U.S. 264, 404 (1821)). A federal court's "'obligation'" to decide a case within its jurisdiction is "'virtually unflagging,'" even when "a pending state-court proceeding involves the same subject matter." *Id.* at 77, 72. *Younger* abstention, the Supreme Court unanimously "clarif[ied]" in *Sprint*, is "'the exception, not the rule.'" *Id.* at 81-82. It is a "'narrow'" exemption from the Article III obligation to decide cases that applies only in "'exceptional'" circumstances. *Id.* at 77-78, 82. Because *Sprint* "narrowed *Younger*'s domain," *Malhan v. Sec'y U.S. Dep't of State*, ___ F.3d ___, 2019 WL 4458806, at *6 (3d Cir. Sept. 18, 2019), this Court should be wary of cases applying *Younger* abstention before 2013.

Here, *Younger* abstention is inappropriate (both before and after *Sprint*) for three main reasons. First, *Younger* does not apply when the plaintiff is the President of the United States asserting the rights of that office—especially not when his asserted right is an absolute immunity from state process. Second, *Younger* does not apply when the

plaintiff challenges a grand-jury subpoena to a third party because there is no pending state proceeding that could adjudicate his claims. Third, the exception to *Younger* abstention for bad-faith harassment applies here.

A. *Younger* does not apply to the President's claim of official immunity from state process.

This dispute involves a sitting President asserting a federal immunity from state process grounded in the U.S. Constitution. The idea that the President of the United States cannot come to federal court for relief under such circumstances is self-refuting. Though no court has considered how *Younger* applies in this context (because no State has ever tried to subject a sitting President to criminal process), the Supreme Court has always recognized that "unusual situations" could emerge that require courts to recognize new exceptions to *Younger* abstention. *Younger*, 401 U.S. at 54. If this case is not one of those situations, then nothing is. Indeed, several previously recognized exceptions to *Younger* illustrate why the doctrine does not apply here.

To begin, *Younger* does not require a plaintiff to litigate in state court when the entire basis of his claim is that he is *immune* from state process. For example, courts recognize an "exception" to *Younger* when the plaintiff alleges that "a state prosecution will violate the Double Jeopardy Clause." *Mannes v. Gillespie*, 967 F.2d 1310, 1312 (9th Cir. 1992). They do so because double jeopardy is not just a defense to liability, but a right not to be prosecuted at all—one that is lost forever if not vindicated immediately. *Id.* at 1312-13 (citing *Abney v. United States*, 431 U.S. 651 (1977)).

The President's claim of absolute immunity is no different. *See Nixon v. Fitzgerald*, 457 U.S. 731, 742 (1982) (likening the President's absolute immunity to double jeopardy and holding that it, too, is lost forever if not vindicated immediately (citing *Abney*, 431 U.S. 651)). Forcing the President to participate in the very proceedings he challenges would prejudge his claim of immunity and cause him irreparable harm—even assuming he could raise his claim of immunity in the grand-jury proceedings. *See Page v. King*, 932 F.3d 898, 904 (9th Cir. 2019); *Studebaker Corp. v. Gittlin*, 360 F.2d 692, 698 (2d Cir. 1966) (explaining that federal courts can enjoin state proceedings "where the very act of prosecuting the state proceeding violate[s] federal law"). The district court responded by denying that grand-jury proceedings really injure the President. *See* JA101. But this reasoning confuses the merits of the President's claim with the question of where his claim should be litigated.

Further, *Younger* abstention is not appropriate where "the federal government is asserting its rights against a state." *United States v. Morros*, 268 F.3d 695, 709 (9th Cir. 2001); *accord United States v. Dicter*, 198 F.3d 1284, 1291 (11th Cir. 1999) ("'[A]bstention is inappropriate when … the United States is seeking to assert a federal interest against a state interest.'"); *United States v. Ga. Composite State Bd. of Med. Examiners*, 656 F.2d 131, 136 (5th Cir. 1981) (same); *United States v. Pa. Dep't of Envtl. Res.*, 923 F.2d 1071, 1078-79 (3d Cir. 1991) (same); *First Fed. Sav. & Loan Ass'n of Bos. v. Greenwald*, 591 F.2d 417, 424 (1st Cir. 1979) ("[A]bstention … [is] inappropriate where a federal agency is asserting 'superior federal interests.'"). When that occurs, "the state and federal

governments are in direct conflict before they arrive at the federal courthouse," "any attempt to avoid a federal-state conflict would be futile," and "abstention … would be useless." *Ga. Composite*, 656 F.2d at 136. When federal and state governments clash, "access to the federal courts is 'preferable in the context of healthy federal-state relations.'" *Id.* (quoting *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 147 (1971)). This principle applies whether the plaintiff is the United States, a federal agency, or a "private party" vindicating federal interests on the federal government's behalf. *Studebaker Corp. v. Gittlin*, 360 F.2d 692, 698 (2d Cir. 1966).

Accordingly, it applies here too. This litigation was brought by the President of the United States. More than a "federal agency," the President is "the Chief Executive" from whom "all executive power exercised by the federal agencies derives." *Monongahela Power Co. v. Reilly*, 980 F.2d 272, 279 (4th Cir. 1992). And the President brought this suit against a state official to vindicate the "superior federal interests" embodied in Article II and the Supremacy Clause. *See United States v. Anderson Cty.*, 705 F.2d 184, 188-89 (6th Cir. 1983) (rejecting *Younger* abstention where the federal government sued to enforce its immunity from state regulation under the Supremacy Clause); *Pa. Dep't of Envtl. Res.*, 923 F.2d at 1079 (similar). The District Attorney's "interest in obtaining a state forum to adjudicate … the validity of [a grand-jury subpoena to the President] is at best concurrent with and at worst totally subservient to the coexisting interest of the United States to obtain a federal adjudication of the propriety and constitutionality of said [process]." *Anderson Cty.*, 705 F.2d at 189.

The district court's contrary reasoning is unpersuasive. While the court believed "there is precedent" applying *Younger* to the federal government, only one of the cases it cited even mentioned *Younger* abstention. *See* JA91-93. And that case, *United States v. Ohio*, 614 F.2d 101 (6th Cir. 1979), found abstention appropriate only because the "sole issue" raised in the federal suit was whether the state defendant had violated *state* law; the federal government "did not assert" that the state defendant had violated the federal Constitution. *Anderson Cty.*, 705 F.2d at 187. This reasoning plainly does not apply to cases, like this one, where the President alleges violations of federal law. *Id.* at 187-89; *see also Morros*, 268 F.3d at 709 (distinguishing *Ohio* on this basis); *Ga. Composite*, 656 F.2d at 135 (deeming *Ohio*'s discussion of abstention "not … persuasive" in cases where the federal government vindicates federal law).

The district court also said it was "not certain" that "this action is brought by the federal government," noting that the President is represented by private attorneys and questioning whether "privately retained, non-government attorneys … are entitled to invoke an immunity allegedly derived from the office of the Presidency." JA91, 69 n.1. But immunities belong to *parties*, not attorneys, and a party's constitutional rights do not change based on the lawyers who represent him. The President brought this suit both as an individual and as the President of the United States; that duality reflects the nature of the office. *See In re Lindsey*, 158 F.3d 1263, 1286 (D.C. Cir. 1998) (Tatel, J., concurring in part and dissenting in part) ("[F]or any President the line between official and personal can be both elusive and difficult to discern"); Jay S. Bybee, *Who Executes*

the Executioner?, 2-SPG NEXUS: J. Opinion 53, 60 (1997) ("The President is the only person who is also a branch of government.").

That is why the Supreme Court has never cared what "capacity" the President is in, or who his lawyers are, when he invokes immunities that are tied to the office. In *Clinton v. Jones*, for example, the Supreme Court allowed President Clinton to claim immunity even though he was "represented by private counsel." 520 U.S. 681, 689 (1997). And in *Nixon v. Administrator of General Services*, the Supreme Court allowed former President Nixon to invoke the President's executive privilege even though he was a private citizen. 433 U.S. 425, 448-49 (1977). Whether the President is a "private party," an "agency," or both, "should not be controlling" under *Younger*. *Studebaker*, 360 F.2d at 698. What matters is that he is here enforcing the superior federal interest in protecting a sitting President from state criminal process. *See id.*

B. *Younger* does not apply to grand-jury subpoenas that are issued to third-party custodians.

Even if *Younger* applied to the President's assertion of federal immunity from state process, there is no *Younger*-qualifying proceeding to defer to here. As the Supreme Court clarified in *Sprint*, only "three exceptional categories" of state proceedings trigger *Younger* abstention: "ongoing state criminal prosecutions," pending "civil enforcement proceedings," and certain other "pending civil proceedings." 571 U.S. at 82, 78 (cleaned up). These categories have two important features in common.

First, the proceedings covered by *Younger* must be "pending"—*i.e.*, "ongoing," "'begun prior to the federal suit'" "already commenced," not "merely incipient or

threatened." *Steffel v. Thompson*, 415 U.S. 452, 460-61 (1974); *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 607 (1975). When no proceeding "is pending at the time the federal complaint is filed," there is nothing for the federal court to *abstain* from, and "federal intervention" does not "result in duplicative legal proceedings," "disrupt[] the state criminal justice system," or "reflect[] negatively upon the state court's ability to enforce constitutional principles." *Steffel*, 415 U.S. at 462. Thus, *Younger* abstention does not apply to a criminal "investigation," or to a prosecution that is merely "threatened"; "[t]he possibility that a state proceeding may lead to a future prosecution of the federal plaintiff is not enough." *Mulholland v. Marion Cty. Election Bd.*, 746 F.3d 811, 817 (7th Cir. 2014); *414 Theater Corp. v. Murphy*, 499 F.2d 1155, 1161-62 (2d Cir. 1974).

Second, the proceedings covered by *Younger* must be ones "which have already been initiated *and* which afford a competent tribunal for the resolution of federal issues." *Huffman*, 420 U.S. at 609 n.21 (emphasis added). In other words, the plaintiff must have "an opportunity to fairly pursue [his] constitutional claims *in the ongoing state proceedings*." *Juidice v. Vail*, 430 U.S. 327, 337 (1977) (emphasis added); *accord Steffel*, 415 U.S. at 462 (noting that *Younger* presupposes the "pending state prosecution provides the federal plaintiff with a concrete opportunity to vindicate his constitutional rights"); *Gerstein v. Pugh*, 420 U.S. 103, 108 n.9 (1975) (rejecting *Younger* abstention because the plaintiff's claim "could not be raised in defense of the criminal prosecution"). *Younger* requires the plaintiff to litigate his claim as a defense to the proceeding the State has initiated; it does not require the plaintiff to "initiate state proceedings" himself. *Huffman*,

420 U.S. at 609 n.21. That would turn *Younger* abstention into an "exhaustion of state remedies" requirement—contradicting section 1983 and "turn[ing] federalism on its head." *Steffel*, 415 U.S. at 472-73. In short, "[u]nless the issue in the plaintiff's federal suit would be resolved by the case-in-chief or as an affirmative defense to the state court proceedings that exist," *Younger* does not apply. *Habich v. City of Dearborn*, 331 F.3d 524, 532 (6th Cir. 2003).

There is no *Younger*-eligible proceeding here. Even assuming a convened grand jury is a "pending criminal prosecution," a grand jury does not "have the authority to *adjudicate* the merits of a federal plaintiff's federal claims." *Monaghan v. Deakins*, 798 F.2d 632, 637 (3d Cir. 1986), *aff'd in part*, *vacated in part*, 484 U.S. 193 (1988). A grand jury does not "adjudicate anything"; it "proceeds ex parte" and exists only to "charge that the defendant has violated the criminal law." *Id.* That is certainly true in New York. *See generally* N.Y. Crim. Proc. Law §§190.05-.90; *see also Brennick v. Hynes*, 471 F. Supp. 863, 867 (N.D.N.Y. 1979) (rejecting *Younger* abstention because a defendant cannot raise federal constitutional claims before a New York grand jury).

To be sure, the circuits are split on *Younger*'s application to grand-jury subpoenas. The Fourth, Fifth, and Eighth Circuits hold that grand-jury subpoenas do implicate *Younger* abstention. They reason that federal courts should abstain because the plaintiff could file a motion to quash the subpoena in state court. *See Kaylor v. Fields*, 661 F.2d 1177, 1182 (8th Cir. 1981); *Tex. Ass'n of Bus. v. Earle*, 388 F.3d 515, 521 (5th Cir. 2004);

Craig v. Barney, 678 F.2d 1200, 1202 (4th Cir. 1982). But the Third Circuit has the better of the argument.

A motion to quash would be a *new* proceeding before a *different* tribunal, not a *defense* that can be raised in the *pending* grand-jury proceeding. That is decisive because, again, *Younger* does not require a plaintiff to "initiate state proceedings." *Huffman*, 420 U.S. at 609 n.21. Rather, as this Court has explained, *Younger* assumes that the plaintiff's "constitutional claims will necessarily be resolved" in the "already pending" proceeding; "to allow state courts in actions *not yet instituted* to determine constitutional questions, would be the equivalent of requiring exhaustion of judicial remedies, which is specifically not required of 1983 actions." *414 Theater*, 499 F.2d at 1162 (emphasis added). The circuits that hold otherwise do not grapple with this basic principle—unsurprisingly, since their opinions were issued in the pre-*Sprint* era when courts "demonstrated greater and greater willingness to abstain." *ACRA Turf Club, LLC v. Zanzuccki*, 748 F.3d 127, 135 (3d Cir. 2014); *Google, Inc. v. Hood*, 822 F.3d 212, 224 & n.7 (5th Cir. 2016).

But regardless how the Court resolves this split, no circuit has applied *Younger* abstention to a grand-jury subpoena to a *third-party custodian*. For good reason. The true target of a subpoena cannot force a third-party custodian to raise his claims by taking contempt or filing a motion to quash. *See U.S. Servicemen's Fund v. Eastland*, 488 F.2d 1252, 1260 (D.C. Cir. 1973), *aff'd in relevant part*, 421 U.S. 491, 501 n.14 (1975); *Nixon*, 418 U.S. at 691. And, in New York, courts have held that the true target lacks standing

to quash a subpoena to a third-party custodian. *See, e.g.*, *People v. Merrick Util. Assocs., Inc.*, 575 N.Y.S.2d 634 (Co. Ct. 1991) (holding that a criminal defendant had no standing to challenge a grand-jury subpoena to his accountant for his personal tax returns); *People v. Doe*, 96 A.D.2d 1018, 1019 (N.Y. App. Div. 1983) ("[I]f the owner of the records … is not opposed to producing them [to the grand jury], the customer is powerless to preclude their production."). Notably, after the President cited these cases below, the District Attorney did not dispute his reading of New York law. *See* JA180:6-9; JA67-68.

The district court, after conducting its own research, asserted that New York law does allow "[a] non-recipient [to] challenge a subpoena." JA89-90. But none of the cases it cited involved grand-jury subpoenas. They were all civil cases—save one, and in that case the court *dismissed* the motion to quash because the movant lacked standing to challenge a third-party subpoena. *See People v. Grosunor*, 439 N.Y.S.2d 243, 245 (Crim. Ct. 1981). The district court's main authority, moreover, did not even involve a third-party subpoena; the person challenging the subpoena was the recipient. *See In re Roden*, 106 N.Y.S.2d 345, 347 (Sup. Ct. 1951). At bottom, New York law does not allow the President's "challenge [to] be raised in the pending state proceedings subject to conventional limits on justiciability." *Moore v. Sims*, 442 U.S. 415, 425 (1979). So *Younger* cannot apply here.

C. *Younger*'s exception for bad-faith harassment applies here.

Finally, *Younger* abstention is inappropriate when the State is "motivated by a desire to harass or is conduct[ing the proceeding] in bad faith." *Huffman*, 420 U.S. at

611. "Abstention would serve no purpose" in these circumstances because the State's bad faith or harassing motive "reduc[es] the need for deference to state proceedings." *Cullen v. Fliegner*, 18 F.3d 96, 104 (2d Cir. 1994). This exception applies when the State is, for example, using a criminal proceeding as a pretext "to permit investigation of other activities." *Anderson v. Nemetz*, 474 F.2d 814, 820 n.2 (9th Cir. 1973); *accord Black Jack Distributors, Inc. v. Beame*, 433 F. Supp. 1297, 1306-07 (S.D.N.Y. 1977). It also applies when "state action" has "no reasonable expectation of obtaining a favorable outcome," though that showing is not necessarily required. *Cullen*, 18 F.3d at 103; *see id.* at 103-04 ("[A] refusal to abstain is also justified … where a prosecution or proceeding is otherwise brought in bad faith or for the purpose to harass."); *Phelps v. Hamilton*, 840 F. Supp. 1442, 1451 (D. Kan. 1993) ("that a prosecution has been brought without a reasonable expectation of obtaining a valid conviction" is not "the only way to prove bad faith"), *aff'd in relevant part*, 122 F.3d 1309, 1322 n.7 (10th Cir. 1997).

The President alleges bad-faith harassment. The District Attorney's subpoena to Mazars cobbled together, virtually word-for-word, two congressional subpoenas—even though New York has no jurisdiction to investigate the federal issues those subpoenas purport to explore. JA22-24 ¶¶48-49, 53. The subpoena even requests documents about a hotel in Washington, D.C. that has absolutely nothing to do with New York. JA24 ¶53. The vast majority of the requested documents are unrelated to the narrow allegations that the District Attorney purports to be investigating. The President's personal federal tax returns are one of the most egregious examples, not only because

of their irrelevance but also because of the ongoing attempts by the House of Representatives, the State of New York, and others to obtain them for partisan reasons. JA15-19 ¶¶25-41.

At oral argument, counsel for the District Attorney admitted that he copied the congressional subpoenas. *See* JA173. While he asserted that those subpoenas "mirrored certainly the scope of what we needed from Mazars," JA173, he offered no explanation for how that could possibly be true. Nor could he, given the vast differences in nature and scope between Congress's investigative authority and the jurisdiction of the District Attorney's office. The District Attorney attempted to defend the indefensible by saying that reissuing the congressional subpoenas was "efficient," since Mazars was already assembling those materials for Congress. JA173. That Mazars assembled materials for an unrelated congressional investigation does not, however, make those same materials "relevant," "material," and "not overbroad or unreasonably burdensome" with respect to the *District Attorney's* investigation. N.Y. Crim. Proc. Law §610.20(4) (eff. Jan. 1, 2010); *accord D'Alimonte v. Kuriansky*, 144 A.D.2d 737, 739 (N.Y. App. Div. 1988). Hence, even assuming the President could file a motion to quash the Mazars subpoena—the "proceeding" that supposedly triggers *Younger*—the District Attorney would have "no reasonable expectation of obtaining a favorable outcome." *Cullen*, 18 F.3d at 103.

Accordingly, the President's complaint "raise[s] the inference" that the District Attorney's subpoena "ha[s] a secondary motive" and "go[es] beyond good faith enforcement of the [criminal] laws." *Black Jack*, 433 F. Supp. at 1306-07. These

allegations, which were only contradicted by a conclusory statement at oral argument, defeat *Younger* abstention at this stage. *See Manos v. Caira*, 162 F. Supp. 2d 979, 987 (N.D. Ill. 2001) ("[Plaintiff] has alleged throughout the Complaint that defendants have acted in bad faith" and "[h]aving been provided no evidence to cast doubt on [Plaintiff's] version of events as described in the Complaint, the Court cannot find that it is required to abstain under *Younger*."); *Phelps*, 122 F.3d at 1322 n.7 (rejecting *Younger* because "there are material facts in dispute as to the applicability of the bad faith exception").

II. The President is constitutionally immune from criminal process while he is in office.

Under Article II, the Supremacy Clause, and the overall structure of our Constitution, the President of the United States cannot be "subject to the criminal process" while he is in office. Memorandum for the U.S. Concerning the Vice President's Claim of Constitutional Immunity 17, *In re Proceedings of the Grand Jury Impaneled Dec. 5, 1972*, No. 73-cv-965 (D. Md.) (Bork Memo). Virtually "all legal commenters" agree. *Id.* The Justice Department agrees too. *See A Sitting President's Amenability to Indictment and Criminal Prosecution*, 24 O.L.C. Op. 222 (Oct. 16, 2000). And no court—until this case—has ever suggested otherwise. Not only did the district court reject this consensus view, it suggested that a criminal process that led to the "imprisonment [of a sitting President] upon conviction" might not violate the Constitution if the sentence was not "lengthy." JA72.

The district court's reasoning is unsustainable. The President is immune from criminal process while in office, and a grand-jury subpoena (a coercive order backed by

the State's threat of contempt) is certainly a form of "criminal process." Because the District Attorney is using that process to target the President and investigate him for alleged state crimes, the subpoena is unconstitutional.

A. States cannot subject a sitting President to criminal process.

The district court spent at least twenty pages of its opinion parsing the Justice Department's memos on presidential immunity, criticizing them for what it viewed as inconsistencies, unanswered questions, and "rhetorical flair." *See* JA113-33. None of that matters. The Justice Department is participating in this case and can tell this Court its current view of the law. And its opinion is relevant only to the extent it accurately interprets the constitutional text, history, and precedent. It is those sources, which the Justice Department has persuasively identified and interpreted, that prove the President is immune from state criminal process while in office.

Text: Article II vests "[t]he executive Power" in one "President of the United States of America." §1. The President thus "occupies a unique position in the constitutional scheme," *Fitzgerald*, 457 U.S. at 749; he "is the only person who is also a branch of government," Bybee 60. Because "the President is a unitary executive," "[w]hen the President is being prosecuted, the presidency itself is being prosecuted." Akhil Reed Amar & Brian C. Kalt, *The Presidential Privilege Against Prosecution*, 2-SPG NEXUS: J. Opinion 11, 12 (1997).

Article II also gives the President immense authority over foreign and domestic affairs. He must, among other things, command the armed forces, negotiate treaties and

receive ambassadors, appoint and remove federal officers, and "take Care that the Laws be faithfully executed." §§2-3. The President is "the chief constitutional officer of the Executive Branch, entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity." *Fitzgerald*, 457 U.S. at 750. "Unlike federal lawmakers and judges, the President is at 'Session' twenty-four hours a day, every day. Constitutionally speaking, the President never sleeps. The President must be ready, at a moment's notice, to do whatever it takes to preserve, protect, and defend the Constitution and the American people." Akhil Reed Amar & Neal Kumar Katyal, *Executive Privileges and Immunities: The Nixon and Clinton Cases*, 108 Harv. L. Rev. 701, 713 (1995).

"'[N]ecessarily implied'" from the grant of these duties is "'the power to perform them.'" *Fitzgerald*, 457 U.S. at 749 (quoting 3 J. Story, *Commentaries on the Constitution of the United States* §1563). "'The president cannot, therefore, be liable to arrest, imprisonment, or detention, while he is in the discharge of his office.'" *Id.* Nor can he be subjected to criminal process. *See A Sitting President's Amenability to Indictment and Criminal Prosecution*, 24 O.L.C. Op. 222, 246-60 (Oct. 16, 2000); *accord Nixon v. Sirica*, 487 F.2d 700, 757 (D.C. Cir. 1973) (MacKinnon, J., concurring in part and dissenting in part) (explaining that "*all* aspects of criminal prosecution of a President must follow impeachment" and that "removal from office must precede *any* form of criminal process against an incumbent President" (emphases added)). "To wound [the President] by a criminal proceeding is to hamstring the operation of the whole governmental apparatus, both in foreign and domestic affairs." Memorandum from Robert G. Dixon,

Jr., Asst. Att'y Gen., O.L.C., *Re: Amenability of the President, Vice President, and Other Civil Officers to Federal Criminal Prosecution While in Office* 30 (Sept. 24, 1973) (Dixon Memo).

Other provisions of the Constitution bolster this conclusion. Beyond creating a unitary executive and granting him immense powers and responsibilities, Article II provides that the President "shall hold his Office during the Term of four Years" and authorizes his "remov[al]" only via "Impeachment." §§1, 4. Removal by impeachment, in turn, requires conviction by two-thirds of the Senate. *See* Art. I, §3. Indeed, the Constitution states that a President "convicted" by the Senate can *then* be "liable and subject to Indictment, Trial, Judgment, and Punishment, according to Law." *Id.* The use of the past-tense "convicted" reinforces that the President cannot be subject to criminal process *before* that point. Bybee 54-65; *see also* Akhil Reed Amar, *On Prosecuting Presidents*, 27 Hofstra L. Rev. 671, 673 (1999) (While "[o]ther impeachable officers … may be indicted while in office, "the Presidency is constitutionally unique" because "in the President the entirety of the power of a branch of government is vested" and "so the language of impeachment in the Constitution sensibly means something slightly different as applied to Presidents").

Any other rule is untenable. It would allow a single prosecutor to circumvent the Constitution's specific rules for impeachment. *See Kendall v. U.S. ex rel. Stokes*, 37 U.S. 524, 610 (1838); 24 O.L.C. Op. at 246. The Constitution's assignment of the impeachment power to Congress and its supermajority requirement for removal ensure that "the process may be initiated and maintained only by politically accountable legislative

officials" who represent a majority of the entire nation. 24 O.L.C. Op. at 246; *see also* Dixon Memo 32 ("[T]he presidential election is the only national election, and there is no effective substitute for it…. The decision to terminate [the President's nationwide electoral] mandate, therefore, is more fittingly handled by the Congress than by a jury"); Amar & Kalt 12 ("The President is elected by the entire polity and represents all 260 million citizens of the United States of America. If the President were prosecuted, the steward of *all* the People would be hijacked from his duties by an official of *few* (or none) of them.").

The constitutional prohibition on subjecting a sitting President to criminal process is even stronger when applied to state and local governments. "Because the Supremacy Clause makes federal law 'the supreme Law of the Land,' Art. VI, cl. 2, any direct control by a state court over the President, who has principal responsibility to ensure that those laws are 'faithfully executed,' Art. II, §3," raises serious constitutional concerns even in civil cases. *Jones*, 520 U.S. at 691. But in criminal cases, where the State is not acting merely as a forum for private litigation but is *itself* interfering with the President's duties, investigating the President plainly violates the Supremacy Clause. That Clause mandates that States cannot "defeat the legitimate operations" of the federal government. *M'Culloch v. Maryland*, 17 U.S. 316, 427 (1819). "It is of the very essence of supremacy, to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence." *Id.* Because the President is the solitary head of

the executive branch, subjecting him to criminal process would "arrest[] all the [executive powers] of the government, and … prostrat[e] it at the foot of the states." *Id.* at 432; *see* Amar & Kalt 13-16.[2]

History: The Framers' debates at the Philadelphia Convention "strongly suggest an understanding that the President, as Chief Executive, would not be subject to the ordinary criminal process." Bork Memo 6. The Framers understood "that the nation's Chief Executive, responsible as no other single officer is for the affairs of the United States, would not be taken from duties that only he can perform unless and until it is determined that he is to be shorn of those duties by the Senate." *Id.* at 17. Oliver Ellsworth and John Adams, for example, stated that "'the President, personally, was not the subject to any process whatever…. For [that] would … put it in the power of a common justice to exercise any authority over him and stop the whole machine of Government.'" *Fitzgerald*, 457 U.S. at 750 n.31. Later, Thomas Jefferson opined that the

[2] The district court's suggestion that, as between state and federal prosecutors, it should be easier for *state* prosecutors to subject the President to criminal process is unpersuasive. *See* JA116-17. State process is just as burdensome, jeopardizing, distracting, and stigmatizing as federal process—and it presents "*additional* concerns" under the Supremacy Clause. 24 O.L.C. at 223 n.2 (emphasis added). In *Jones*, for example, the Supreme Court held that the President can be civilly sued for certain unofficial conduct in federal court, but reserved the question whether he could be sued in state court—not because that question was easier, but because state process might "present a *more* compelling case for immunity." *Jones*, 520 U.S. at 691 (emphasis added). Indeed, even those who believe (incorrectly) that the President can be federally prosecuted concede that a state prosecution would pose a much harder question. *See, e.g.*, Ronald D. Rotunda, *Memo. to Independent Counsel Kenneth Starr Re: Indictability of the President* (May 13, 1998) (concluding that the President can be federally prosecuted but "express[ing] no opinion" on a state prosecution because "a state prosecution may violate the Supremacy Clause").

Constitution would not tolerate the President being "'subject to the commands of the [judiciary], & to imprisonment for disobedience; if the several courts could bandy him from pillar to post, keep him constantly trudging from north to south & east to west,'" they could "'withdraw him entirely from his constitutional duties.'" *Id.*

When the Framers discussed the possibility of subjecting a President to criminal process, they uniformly agreed that the process would occur *after* impeachment and removal from office. *See, e.g.*, Federalist No. 69, at 416 (Alexander Hamilton) (Rossiter ed., 1961) ("The President … would be liable to be impeached, tried, and, upon conviction … would *afterwards* be liable to prosecution and punishment in the ordinary course of law." (emphasis added)); 2 Farrand, *Records of the Federal Convention* 500 (rev. ed. 1966) (Gouverneur Morris: "A conclusive reason for making the Senate instead of the Supreme Court the Judge of impeachments, was that the latter was to try the President *after* the trial of the impeachment." (emphasis added)); Federalist No. 77 at 464 (Alexander Hamilton) (discussing impeachment and "*subsequent* prosecution in the common course of law" (emphasis added)).

Tellingly, until now, no state or local prosecutor has ever initiated criminal process against a sitting President. Not for lack of temptation: The President is an "easily identifiable target," *Fitzgerald*, 457 U.S. at 752-53, and state and local prosecutors have massive incentives to target him with investigations and subpoenas to advance their careers, enhance their reelection prospects, or make a political statement. The fact that "earlier [States] avoided use of this highly attractive power" suggests strongly that

"the power was thought not to exist." *Printz v. United States*, 521 U.S. 898, 905 (1997). That instinct was correct.

Precedent: The Supreme Court has never considered whether a State can subject a sitting President to criminal process. But the precedents that do exist are careful not to decide this question and, if anything, suggest that the President *does* have this immunity.

In *Nixon*, the Supreme Court held that the President was not immune from a federal court's criminal subpoena. 418 U.S. at 707. But *Nixon* involved federal process, not state process. *See id.* (stressing how presidential immunity would "gravely impair the role of the courts under Article III"). More importantly, the subpoena upheld in *Nixon* asked the President to provide evidence in *someone else's* criminal proceeding; the President was not himself a target. *See United States v. Nixon*, 418 U.S. 683, 710 (1974) ("In this case the President challenges a subpoena served on him as a third party"); 24 O.L.C. Op. at 255 & n.32 ("[*United States v. Nixon*] did not address the interest in facilitating criminal proceedings against the President" but involved "the withholding of evidence relevant to the criminal prosecution of other persons").[3] Indeed, *Nixon* refused to decide whether a grand jury could name a sitting President as an unindicted coconspirator—an issue it found difficult, since it granted the United States' cross-petition for certiorari on that question. *See* 418 U.S. at 687 n.2.

[3] The same is true for the subpoena that ordered President Jefferson to produce evidence for Aaron Burr's criminal trial. *See United States v. Burr*, 25 F. Cas. 30 (C.C.D. Va. 1807).

The differences between treating the President as a witness in a criminal proceeding and treating him as a target in a criminal proceeding cannot be overstated. Only the latter carries the "distinctive and serious stigma," the "public … allegation of wrongdoing," and "the unique mental and physical burdens" that are "placed on a President facing criminal charges." 24 O.L.C. Op. at 249-52; *accord* Alberto R. Gonzales, *Presidential Powers, Immunities, and Pardons*, 96 Wash. U.L. Rev. 905, 940 n.153 (2019) (distinguishing "between the President testifying as a nonparty witness and the President testifying as a criminal defendant, the latter of which" implicates "presidential immunity from investigation, indictment, and prosecution").

Further, in *Jones*, the Supreme Court held that the President was not temporarily immune from a federal civil suit concerning certain unofficial conduct. 520 U.S. at 684. But the Court was careful to leave open whether the same would be true if the civil suit was brought in state court, and it flagged the violation of the Supremacy Clause that the President raises here. *Id.* at 691 & n.13; *see supra* n.2. Most crucially, though, *Jones* involved a civil suit, not a criminal prosecution.

Criminal process comes with a "distinctive and serious stigma" that "imposes burdens fundamentally different in kind from those imposed by the initiation of a civil action"—burdens that would intolerably "threaten the President's ability to act as the Nation's leader in both the domestic and foreign spheres." 24 O.L.C. Op. at 249. "A civil complaint filed by a private person is understood as reflecting one person's allegations," while the "stigma and opprobrium associated with a criminal charge" is "a

public rather than private allegation of wrongdoing" that would "undermin[e] the President's leadership and efficacy both here and abroad." *Id.* at 250-51. The "burdens of responding" to criminal proceedings, moreover, "are different in kind and far greater than those of responding to civil litigation," given their intensely personal nature, their "unique mental and physical burdens" on the suspect, and the "substantial preparation" they demand. *Id.* at 251-54.

B. The district court's contrary conclusion is unpersuasive.

The district court found this textual, historical, and precedential evidence unpersuasive, but it's not clear why. While it cited *Nixon* and *Clinton*, it did not respond to any of the distinctions drawn above. *See* JA134-35. And while the district court asserted that the historical and textual evidence "'largely cancel each other,'" it never cited any historical or textual evidence going the other way. *See* JA133-34.

The only countervailing evidence that the district court cited was the maxim that the President is not "above the law." JA74, 76, 132, 133, 136, 139. But the notion that immunity "places the President 'above the law'" is "wholly unjustified." *Fitzgerald*, 457 U.S. at 758 n.41. "It is simply error to characterize an official as 'above the law' because a particular remedy is not available against him." *Id.* Again, "[a] sitting President who engages in criminal behavior falling into the category of 'high Crimes and Misdemeanors' is always subject to removal from office upon impeachment by the House and conviction by the Senate, and is thereafter subject to criminal prosecution." 24 O.L.C. Op. at 257; *see also* Bybee 63 ("[T]hat the President is not above the law … is

a red herring…. [The relevant constitutional] clauses do not give the President immunity from prosecution; rather, they specify an order in which things are to occur."). We of course have "a government of laws, not men," but "the People have a right to a vigorous Executive who protects and defends them, their country, and their Constitution. Temporary immunity is the only way to ensure both of these things." Amar & Kalt 20-21.

The district court also worried that Presidents who commit crimes would escape liability because, by the time they leave office, the statute of limitations will have run. JA130-31. But this assumes the limitations period would not be tolled while the President was in office and immune from prosecution—an open question of law that the district court did not analyze or resolve. 24 O.L.C. Op. at 256 n.33. Statutes of limitations, moreover, are largely within the States' control. *Id.* at 256 & n.34. The district court's concern simply lacks "significant constitutional weight" in the overall analysis. *Id.* at 256.

Finally, the district court opined that the President's immunity from state criminal process should be decided not with a "categorical rule," but on a "case-by-case" basis—formulating a list of eight non-dispositive factors that it thought should be "balanc[ed]" against each other. *See* JA136-41. That approach ignores reality. If the Court holds that the President is not immune from state criminal process, then Presidents must contend not just with New York County but with *every* state and local prosecutor across the country. And given the heavy burdens associated with criminal

process, "all you need is one prosecutor, one trial judge, the barest amount of probable cause, and a supportive local constituency, and you can shut down a presidency." Jed Shugerman, *A Sitting President Generally Can't Be Indicted*, ShugerBlog (May 22, 2018), bit.ly/2kCYb0w. The notion that a federal court will adjudicate—on a case-by-case basis—whether State criminal process "target[s] a President on politicized grounds" is legally untenable and practically unworkable. JA95 n.9.

More importantly, the Supreme Court has never taken this approach to absolute immunity. The "functional balancing" it conducts occurs only "at a global, categorical level." Alan K. Chen, *The Ultimate Standard: Qualified Immunity in the Age of Constitutional Balancing Tests*, 81 Iowa L. Rev. 261, 285-92 (1995). In *Jones*, for example, the Court analyzed the President's immunity categorically and rejected the notion that it should adopt a case-by-case balancing test. Balancing tests are "more appropriately the subject of the exercise of judicial discretion than an interpretation of the Constitution," it explained; the Framers "would have adopted a categorical rule [rather] than a rule that required the President to litigate the question whether a specific case" implicated his immunity. 520 U.S. at 706. Likewise, in *Fitzgerald*, the Court recognized a categorical absolute immunity for the President's official acts; it refused to "draw functional lines finer" than this, since case-by-case assessments "could be highly intrusive," "would subject the President to trial on virtually every allegation," and "thus would deprive absolute immunity of its intended effect." 457 U.S. at 756; *accord Tenney v. Brandhove*, 341 U.S. 367, 377-78 (1951); *Imbler v. Pachtman*, 424 U.S. 409, 419 n.13 (1976).

In sum, a categorical rule against subjecting a President to state criminal process "is most consistent with the constitutional structure." 24 O.L.C. Op. at 254. But even under a case-by-case regime, the President still wins this case. The subpoena to Mazars is highly intrusive to the President, as it seeks nearly a decade of his sensitive financial records. And the District Attorney has never explained why this subpoena—which he admittedly copied from two unrelated congressional investigations—is relevant to the allegations he is investigating. Indeed, politically motivated subpoenas like this one are a perfect illustration of why the President should be categorically immune from state criminal process while in office.

C. The District Attorney's subpoena subjects the President to criminal process.

The Mazars subpoena is a form of "criminal process" that implicates the President's immunity. It requests the President's records, names him as a target, and was issued to bolster "a finding that it is probable that the President has committed a crime." *Sirica*, 487 F.2d at 758 (MacKinnon, J., concurring in part and dissenting in part). That insinuation, even if made "obliquely," would "vitiate the sound judgment of the Framers that a President must possess the continuous and undiminished capacity to fulfill his constitutional obligations." *Id.*

Criminal investigations, moreover, "are time-consuming and distracting" to a President. *See* Brett M. Kavanaugh, *Separation of Powers During the Forty-Fourth Presidency and Beyond*, 93 Minn. L. Rev. 1454, 1461 (2009). "[C]riminal investigations take the President's focus away from his or her responsibilities to the people"; after all, "a

President who is concerned about an ongoing criminal investigation is almost inevitably going to do a worse job as President." *Id.* "Even the lesser burdens of a criminal investigation—including preparing for questioning by criminal investigators—are time-consuming and distracting." *Id.* That is especially true here, where the District Attorney has subpoenaed not just the President's tax returns but reams of his private financial records spanning almost a decade. More fundamentally, given the Constitution's provisions governing impeachment, "congressional investigation must take place in lieu of criminal investigation when the President is the subject of investigation." Brett M. Kavanaugh, *The President and the Independent Counsel*, 86 Geo. L.J. 2133, 2158 (1998). "Investigation of the President, Hamilton stated, is a kind of 'NATIONAL INQUEST' and '[i]f this be the design of it, who can so properly be the inquisitors for the nation as the representatives of the nation themselves.'" *Id.* (quoting The Federalist No. 65, at 397 (Alexander Hamilton)).

But this Court does not need to decide whether criminal investigations of the President are always impermissible. The District Attorney is not merely investigating the President by, for example, passively "gather[ing]" or "preserv[ing]" evidence until the President is no longer in office. 24 O.L.C. Op. at 257 n.36. He has issued a subpoena—a form of coercive process backed up by the State's contempt power. *See Nixon*, 418 U.S. at 691-92 ("[W]hether a President can be cited for contempt" for disobeying a subpoena would provoke a "constitutional confrontation" and require "protracted litigation"). However the Court defines "criminal process" for purposes of

delineating the President's constitutional immunity, a coercive court order plainly counts.

That the subpoena is directed to Mazars, a neutral third-party custodian, changes nothing. Subpoenas to custodians are, functionally speaking, no different from subpoenas to the target of the investigation. *See, e.g.*, *United States v. AT&T Co.*, 551 F.2d 384, 385 (D.C. Cir. 1976) (acknowledging that a congressional subpoena to AT&T for executive-branch records was really a "clash between the executive and legislative branches" because "AT&T … has no stake in the controversy beyond knowing whether its legal obligation is to comply with the subpoena or not"). Here too, the District Attorney subpoenaed Mazars precisely because of its connections with the President and for the purpose of defeating the President's right to object. When the House Oversight Committee issued a virtually identical subpoena to Mazars, both Congress and the Justice Department agreed that the subpoena should be treated as a subpoena against the President. *See* Br. 13; U.S. Amicus Br. 7, *Trump v. Mazars USA, LLP*, No. 19-5142 (D.C. Cir.) ("[T]his subpoena is in practical effect no different from one served on the President…. [It] should be treated for separation-of-powers purposes as if it were directed to the President."). So too here. The only possible difference between a subpoena to Mazars and a subpoena to the President, for constitutional purposes, is that subpoenaing Mazars "relieve[s]" the President "of the physical burden of complying with the subpoena." U.S. Amicus Br. 7. That distinction is meaningless, since

the President of the United States "would not personally compile the requested documents even if he were the subpoena's recipient." *Id.*

The district court repeatedly stressed that the President is not the "sole target" of the District Attorney's investigation, that "other individuals and business entities" are involved, and that the grand jury "may or may not ultimately target [*i.e.*, indict] the President." *See* JA103-04, 73, 94. But the flipside of these statements is that the President is *a* target of the investigation and that he *may* be indicted. The District Attorney conceded as much below. In his brief, he candidly admitted that the grand jury is "seeking the books and records … of the President," is investigating "business transactions that … includ[e] the President," and is pursuing what he views as illegal "business transactions involving [the President]" and "crimes at the behest of [the President]." Doc. 16 at 12-13, 22, 19. And at argument, he reiterated that the subpoena "certainly calls for documents that pertain … to the president" and that "the president" is "one of the individuals whose records are implicated by the subpoena." JA172, 175. He even expressed concern that he would run out of time to bring "charges" against "the president himself" before he "is out of office." JA183-84.

The notion that a State can criminally prosecute the President so long as it *also* prosecutes other people cannot be the law. It would render the President's immunity an easily circumventable nullity. True, the District Attorney's decision to criminally investigate the President—and his unwillingness to disaggregate which parts of the subpoena are directed at the President and which ones are not—could hamper his

investigation of other individuals and entities. *See* Bork Memo 21-22. But that is a problem of the District Attorney's own making. It does not give the courts license to ignore the President's immunity from criminal process.

III. The President is entitled to interim relief that allows him to litigate his claim in this Court and the Supreme Court.

Throughout this case, the President has been unable to litigate his constitutional claim without first securing emergency interim relief. Forcing the President into this posture was precisely why the District Attorney subpoenaed a neutral third-party custodian for his records. *See In re Katz*, 623 F.2d 122, 124 (2d Cir. 1980) ("The theory … is that the third party will not be expected to risk a contempt citation and will surrender the documents sought, thereby letting the 'cat out of the bag' and precluding effective [judicial] review [by the true target]."). While committees of Congress have used the same maneuver in similar cases, they at least agreed to stay enforcement of their subpoenas until the appellate courts could resolve the President's claims. *See* Doc. 5-2, *Trump v. Deutsche Bank, AG*, No. 19-1540 (2d Cir.) ("the Committees … agree to suspend the time for production set by the subpoenas during the pendency of this appeal"); Doc. 1789081, *Trump v. Mazars USA, LLP*, No. 19-5142 (D.C. Cir.) (same). The District Attorney's refusal to do the same here reflects a regrettable disregard for both the federal courts and the Office of the Presidency. And the intolerable situation it has created affects how this Court must proceed.

As things stand, the Court has temporarily stayed the challenged subpoena "until argument is completed" on October 23. JA199; *see* CA2 Doc. 50. The President asks

that the Court, before then, extend the stay until it issues its final opinion and mandate in this appeal. *See* Fed. R. App. P. 8; *e.g.*, *Matter of Mackin*, 668 F.2d 122, 137 (2d Cir. 1981) (explaining that a "stay pending expedited appeal" will "terminate upon the coming down of the mandate"). There is no good reason to force the President to rush to the Supreme Court immediately after oral argument on October 23—before this Court has decided the appeal or issued an opinion explaining its reasoning. That is why administrative stays typically expire when the court *reaches a decision*, not when the court merely hears arguments about how it should reach a decision. *See, e.g.*, *Dellums v. Powell*, 561 F.2d 242, 245 n.7 (D.C. Cir. 1977) (explaining the Court had "granted an 'administrative stay'" blocking a third-party subpoena directed at former President Nixon that "remained in effect pending further order of the court").

When the Court does issue its opinion, that opinion should do one of two things. If the Court agrees with the President on the merits, then its opinion should simply enter judgment in his favor. The President is entitled to judgment as a matter of law, and appellate courts often spare defendants who are entitled to immunity from further litigation by simply entering judgment in their favor. *See, e.g.*, *Naumovski v. Norris*, 934 F.3d 200, 222 (2d Cir. 2019).[4] Alternatively, if the Court disagrees with the President on the merits (in full or in part), then its opinion should stay the mandate and subpoena

[4] Alternatively, this Court could reverse the district court and remand with instructions to enter judgment for the President or to grant his motion for a preliminary injunction. The President is entitled to preliminary relief for essentially the same reasons he is entitled to a stay. *Infra* III.A-C.

until the President files a petition for a writ of certiorari in the Supreme Court. *See* Fed. R. App. P. 41(d). Per Rule 41(d)(2)(B)(iii), that stay would then remain in place "until the Supreme Court's final disposition."

The President is entitled to a stay pending appeal and certiorari. Courts consider four factors when deciding whether to grant a stay: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *accord Books v. City of Elkhart*, 239 F.3d 826, 827-28 (7th Cir. 2001) (Ripple, J., in chambers). While the district court considered similar factors when it denied the President's motion for a preliminary injunction, a stay requires this Court to make its "own" equitable judgment. *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017); *see A. Philip Randolph Inst. v. Husted*, 907 F.3d 913, 917 (6th Cir. 2018) (explaining that stay motions are "not an appeal of the district court's decision" and thus the district court's preliminary-injunction analysis is not "subject to abuse of discretion review"). This Court's equitable judgment should "take into account the fact" that a stay pending appeal is significantly less burdensome than a preliminary injunction. *Mohammed v. Reno*, 309 F.3d 95, 101 n.6 (2d Cir. 2002).

Here, equity favors a stay. That should not be surprising; in every case involving judicial process against a sitting President, the courts stayed the process until he could

litigate the claim of immunity in the Supreme Court. *See* Judge Order, *Jones v. Clinton*, No. 95-1167 (8th Cir. Apr. 16, 1996) (granting President Clinton's "motion to stay the mandate" until "a petition for writ of certiorari has been filed" and declaring that "this stay shall continue until final disposition of the case by [the Supreme C]ourt"); *Nixon*, 418 U.S. at 714 ("Enforcement of the subpoena duces tecum was stayed pending this Court's resolution of the issues raised by the petitions for certiorari."). Importantly, courts entered stays in these cases even though they disagreed with the President's claim of immunity and ultimately rejected it on the merits. They recognized that courts weighing the four stay factors cannot "'proceed against the president as against an ordinary individual'" and must "accord[] that high degree of respect due the President of the United States." Nixon, 418 U.S. at 714-15; *accord Jones*, 520 U.S. at 707. So too here.

A. The President has identified serious questions on the merits.

The President is not just "likely" to succeed on the merits; he is entitled to judgment in his favor on both *Younger* and his constitutional claim. *See supra* I-II. But even if the Court disagrees with the President's arguments (now or later), it should still grant him a stay.

"The necessary level or degree of possibility of success" that a movant must show "will vary according to the court's assessment of the other stay factors." *Mohammed*, 309 F.3d at 101-02 (cleaned up). When the other stay factors favor the movant, he can obtain a stay even if his chances of prevailing are "less than 50 percent";

otherwise, he "would be required to persuade the stay panel that he was more likely than not to win the appeal before the merits panel, just to obtain the critical opportunity to maintain the status quo until the merits panel considers the appeal." *Id.* at 102. Stated another way, movants can obtain a stay if they identify "'sufficiently serious questions going to the merits to make them a fair ground for litigation.'" *Citigroup Glob. Markets, Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35, 37 n.7 (2d Cir. 2010).

The district court found the serious-questions standard inapplicable here because the President is "attempt[ing] to 'stay government action taken in the public interest pursuant to a statutory scheme.'" JA105 (quoting *Able v. United States*, 44 F.3d 128, 131 (2d Cir. 1995)). That reasoning is mistaken. The serious-questions standard is not inapplicable "'merely because a movant seeks to enjoin government action'"; this Court has repeatedly "applied [it] in suits against governmental entities." *Time Warner Cable of N.Y.C. v. Bloomberg L.P.*, 118 F.3d 917, 923 (2d Cir. 1997) (quoting *Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d 1326, 1339 (2d Cir. 1992)). While the Court does not apply the serious-question standard when plaintiffs challenge policies produced by "the full play of the democratic process involving both the legislative and executive branches," the Court does apply it when plaintiffs "challenge[] action taken pursuant to [a] policy formulated solely by [one] branch." *Able*, 44 F.3d at 131.

This subpoena was approved by one county prosecutor, in one State, *against* a sitting President. In inter-governmental disputes like these, courts cannot assume that the challenged action is "presumptively reasoned," or afford one government "a higher

degree of deference." *Able*, 44 F.3d at 131. That is especially true in cases, like this one, where the entire dispute is whether the State is acting within its constitutional authority. *See Carey v. Klutznick*, 637 F.2d 834, 839 (2d Cir. 1980) (applying the serious-questions standard against the government because "the public interest also requires obedience to the Constitution"); *Eastland*, 488 F.2d at 1256 (applying the serious-questions standard where the plaintiff challenged the constitutionality of a congressional subpoena to a third-party custodian). "[I]n litigation such as is presented herein, no party has an exclusive claim on the public interest." *Haitian Ctrs.*, 969 F.2d at 1339. The President is thus entitled to a stay if he satisfies the serious-questions standard.

He plainly does. On *Younger* abstention, the district court acknowledged that its application to this case presents "complexities and uncharted ground." JA103. Whether *Younger* applies to grand-jury subpoenas, for example, has "split" the federal circuits. *Earle*, 388 F.3d at 519; JA84-85. The Supreme Court has granted certiorari on that question before, and has yet to resolve it. *See Deakins v. Monaghan*, 484 U.S. 193, 195 (1988). The district court also noted that *Younger*'s application to a President's suit was "'difficult'" and "not … directly addressed" by circuit precedent. JA90, 92. On the merits, the district court acknowledged that the President's constitutional claim "has not been presented squarely in any judicial forum" and "has never been definitively resolved." JA112, 72. And the district court's opinion rejected the official position of the Justice Department for nearly the last fifty years over eight administrations—a position the court confessed has "assumed substantial legal force." JA114. Undoubtedly

then, this case presents momentous questions of first impression, and the judiciary's resolution of it will have lasting effects for the separation of powers, federalism, and our entire constitutional structure.

Indeed, the Supreme Court has stressed the "importance" of questions concerning presidential immunity. *Jones*, 520 U.S. at 689. It has granted certiorari to decide these questions even in "one-of-a-kind" cases, with no "conflict among the Courts of Appeals," and with "no precedent supporting the President's position." *Id.*; *accord Nixon*, 418 U.S. at 686-87 (taking the rare step of granting certiorari before judgment to review the President's alleged immunity "because of the public importance of the issues presented"). The Supreme Court granted certiorari based on the "respectful and deliberate consideration" it gives to "representations made on behalf of the Executive Branch as to the potential impact" that judicial process would have on the Presidency—representations that the executive branch makes here as well. *Jones*, 520 U.S. at 689-90. As this Court acknowledged when it granted the President an administrative stay, this appeal raises "unique issues" that warrant careful and deliberate consideration. CA2 Doc. 10.

B. The President will suffer irreparable injury without a stay.

Once this Court's administrative stay expires, Mazars will promptly disclose stacks of the President's confidential records to the District Attorney and grand jury. That disclosure will irreparably harm the President. This Court has "defined 'irreparable harm' as certain and imminent harm for which a monetary award does not adequately

compensate." *Wisdom Imp. Sales Co. v. Labatt Brewing Co.*, 339 F.3d 101, 113 (2d Cir. 2003). "The disclosure of private, confidential information 'is the quintessential type of irreparable harm that cannot be compensated or undone by money damages.'" *Airbnb, Inc. v. City of New York*, 373 F. Supp. 3d 467, 499 (S.D.N.Y. 2019). The disclosure of confidential records is "[c]learly … irreparable in nature" because the custodian "cannot subsequently perform its commitment to its clients to protect the confidentiality of the … information," "[t]here is no way to recapture and remove from the knowledge of others information improperly disclosed," and "no award of money damages will change the fact that information which Plaintiff was entitled to have kept from the knowledge of third parties is no longer shielded from their gaze." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bishop*, 839 F. Supp. 68, 72 (D. Me. 1993). "Once the documents are surrendered," in other words, "confidentiality will be lost for all time. The status quo could never be restored." *Providence Journal Co. v. FBI*, 595 F.2d 889, 890 (1st Cir. 1979).

Even if the information is never disclosed to the "public," JA108, disclosure to *the State* still irreparably harms the President. *See NTEU v. DOT*, 838 F. Supp. 631, 640 (D.D.C. 1993) ("[O]nce … highly personal information is disclosed to the government, the revelation cannot be undone."); *Airbnb*, 2019 WL 91990, at *23-24 (deeming disclosure of confidential information to New York City irreparable); *Eastland*, 488 F.2d at 1267 (holding "there can be no doubt that … immediate and irreparable injury would result from the execution of the subpoena" because Congress could use the plaintiffs'

records to "'furnish leads for further investigation'"). It is cold comfort to the President that only the District Attorney and the grand jury—institutions currently deciding whether to indict him for a crime—will have his information.

The President's injury is still irreparable even though the District Attorney has promised that, if he loses this case, he will return, destroy, and never use the information he receives from Mazars. Even then, nothing could "return[] [the parties] to the positions they previously occupied." *Brenntag Int'l Chemicals, Inc. v. Bank of India*, 175 F.3d 245, 249 (2d Cir. 1999). Just as "attorneys cannot unlearn what has been disclosed to them in discovery," *Chase Manhattan Bank, N.A. v. Turner & Newall, PLC*, 964 F.2d 159, 165 (2d Cir. 1992), neither the District Attorney's office nor the grand jury will be able to "erase from its memory" information illegally obtained during the course of an investigation, *In re Grand Jury Matter #3*, 847 F.3d 157, 164 (3d Cir. 2017). There will be "no way to unscramble the egg scrambled by the disclosure." *In re Ford Motor Co.*, 110 F.3d 954, 963 (3d. Cir. 1997); *accord Maness v. Meyers*, 419 U.S. 449, 460 (1975) ("Compliance could cause irreparable injury because appellate courts cannot always 'unring the bell' once the information has been released."). Only a stay can preserve the status quo while the parties litigate the serious questions raised here.

C. The defendants and the public will not be injured by a stay.

Granting a stay would not just spare the President irreparable harm. It would help one of the defendants, negligibly affect the other, and promote the national public interest—which dwarfs the narrow interests of New York County.

Mazars will benefit from an order preserving the status quo. As a matter of state and federal law, accountants like Mazars have a legal obligation to keep their clients' information confidential. See AICPA Code §1.700.001.01 (prohibiting accountants from "disclos[ing] any confidential client information without the specific consent of the client"); 8 N.Y.C.R.R. §29.10(c) ("[U]nprofessional conduct" by accountants includes the "revealing of personally identifiable facts, data or information obtained in a professional capacity without the prior consent of the client."); 26 U.S.C. §7216 (prohibiting tax preparers from disclosing tax returns). A subpoena does not exempt Mazars from this duty unless it is "validly issued and enforceable." AICPA Code §1.700.001.02. But the validity and enforceability of the subpoena is exactly what the President challenges in this lawsuit.

Mazars thus faces a difficult choice: ignore the subpoena and risk adverse action by the District Attorney, or comply with the subpoena and risk liability to the President. Only a stay resolves this dilemma: It allows an "orderly resolution of [the] disputed question" by permitting Mazars to "merely await a court ruling on [the President's] challenge." *AT&T*, 567 F.2d at 129. In fact, this Court could issue a stay here if only to enforce the important principle that, when a client "challenges the enforceability of a subpoena," the accountant "c[an] refuse to produce the documents, thereby allowing [the client to litigate], without violating its obligation to comply with enforceable subpoenas." *United States v. Deloitte LLP*, 610 F.3d 129, 142 (D.C. Cir. 2010).

As for the District Attorney (and the limited subset of the public he represents), a stay will cause only negligible harm. A stay will not affect *whether* the grand jury gets the subpoenaed documents from Mazars: If the District Attorney wins this case, he will get the documents; and if he loses, he was never entitled to the documents anyway. Thus, his only injury is the time delay between receiving the documents now versus receiving the documents later—a non-irreparable injury that is far outweighed by the harm that disclosure would cause the President. *See Araneta v. United States*, 478 U.S. 1301, 1304-05 (1986) (Burger, C.J., in chambers) (granting a stay despite the public's "strong interest in moving forward expeditiously with a grand jury investigation" because "the risk of injury to the applicants could well be irreparable and the injury to the Government will likely be no more than the inconvenience of delay"); *John Doe Agency v. John Doe Corp.*, 488 U.S. 1306, 1309 (1989) (Marshall, J., in chambers) ("[T]he [defendant's] interest in receiving this information immediately … poses no threat of irreparable harm."); *Providence Journal*, 595 F.2d at 890 (similar).

The District Attorney has never identified a concrete injury that would result from the short delay that a stay would entail. While he has raised concerns that the statute of limitations could expire, he neglects to mention that the President has offered to toll the limitations period while this litigation is pending. Nor has he explained why the Mazars subpoena is essential to his ability to bring charges within the limitations period—a dubious proposition, since that subpoena was photocopied from two unrelated congressional investigations, overlaps with other subpoenas that the District

Attorney has issued, and asks for materials that are far afield from the conduct he claims to be investigating. Any time pressure is largely the District Attorney's fault, moreover, because he waited at least six months after learning about the alleged conduct before he issued the subpoena to Mazars. *See Judicial Watch, Inc. v. DHS*, 514 F. Supp. 2d 7, 11 (D.D.C. 2007) ("That the public interest can only be served by the immediate release of these records simply has not been demonstrated" because ""the events at issue are already several years old").

Finally, any harm to New York County's interest in pursuing a single criminal case is far outweighed by the *nation's* interest in having these constitutional questions of first impression resolved with the most "respectful and deliberate consideration." *Jones*, 520 U.S. at 690; *see, e.g.*, *Nixon*, 418 U.S. at 714. Misjudging the President's immunity from criminal process could have unpredictable and long-lasting consequences for this country. *Jones*, 520 U.S. at 689-90; *see Fitzgerald*, 457 U.S. at 752-53 ("Cognizance of [his] personal vulnerability frequently could distract a President from his public duties, to the detriment of not only the President and his office but also the Nation that the Presidency was designed to serve."). And it could deprive "the People" of their "right to a vigorous Executive who protects and defends them, their country, and their Constitution." Amar & Kalt 20-21.

CONCLUSION

For all these reasons, the Court should immediately stay the District Attorney's subpoena to Mazars until its mandate issues. In its decision, the Court should reverse

the district court and direct judgment to be entered for the President. If the Court disagrees with the President on the merits, then its decision should stay the subpoena until the President files a certiorari petition in the Supreme Court.

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Respectfully submitted,

s/ William S. Consovoy

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CERTIFICATE OF COMPLIANCE

This brief complies with Rule 32(a)(7)(B) because it contains 12,948 words, excluding the parts that can be excluded. This brief also complies with Rule 32(a)(5)-(6) because it is prepared in a proportionally spaced face using Microsoft Word 2016 in 14-point Garamond font.

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CERTIFICATE OF SERVICE

I filed a true and correct copy of this brief with the Clerk of this Court via the CM/ECF system, which will notify all counsel of record.

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